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9 **BEFORE THE**
BOARD FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS
10 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

11 In the Matter of the Accusation Against:

Case No. 897-A

12 **DAVID HARLAN LOWEN**
13 **145 North Melrose Drive, Suite 200**
14 **Vista, CA 92083**

A C C U S A T I O N

15 **Civil Engineer License No. C 31915**

16 Respondent.

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18
19 Complainant alleges:

20 **PARTIES**

21 1. David E. Brown (Complainant) brings this Accusation solely in his official capacity
22 as the Executive Officer of the Board for Professional Engineers and Land Surveyors,
23 Department of Consumer Affairs.

24 2. On or about August 14, 1980, the Board for Professional Engineers and Land
25 Surveyors issued Civil Engineer License Number C 31915 to David Harlan Lowen (Respondent).
26 The Civil Engineer License was in full force and effect at all times relevant to the charges brought
27 herein and will expire on December 31, 2010, unless renewed.

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JURISDICTION

3. This Accusation is brought before the Board for Professional Engineers and Land Surveyors (Board), Department of Consumer Affairs, under the authority of the following laws.

All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 6775 of the Code states, in pertinent part,

[T]he board may reprove, suspend for a period not to exceed two years, or revoke the certificate of any professional engineer registered under this chapter:

....

(c) Who has been found guilty by the board of negligence or incompetence in his or her practice.

....

(g) Who in the course of the practice of professional engineering has been found guilty by the board of having violated a rule or regulation of unprofessional conduct by the board.

....

5. Section 118, subdivision (b), of the Code provides that the suspension, expiration, surrender or cancellation of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated.

STATUTORY PROVISIONS

6. Section 6749 of the Code states, in pertinent part,

(a) A professional engineer shall use a written contract when contracting to provide professional engineering services to a client pursuant to this chapter. The written contract shall be executed by the professional engineer and the client, or his or her representative, prior to the professional engineer commencing work, unless the client knowingly states in writing that work may be commenced before the contract is executed. The written contract shall include, but not be limited to, all of the following:

(1) A description of the services to be provided to the client by the professional engineer.

(2) A description of any basis of compensation applicable to the contract, and the method of payment agreed upon by the parties.

(3) The name, address, and license or certificate number of the professional engineer, and the name and address of the client.

(4) A description of the procedure that the professional engineer and the client will use to accommodate additional services.

1 (5) A description of the procedure to be used by any party to terminate the
2 contract.

3

4 REGULATORY PROVISIONS

5 7. California Code of Regulations, Title 16, section 404.1 states, in pertinent part,

6 (a) As used in the Professional Engineers Act, the term "responsible charge"
7 directly relates to the extent of control a professional engineer is required to
8 maintain while exercising independent control and direction of professional
engineering services or creative work and to the engineering decisions which can
be made only by a professional engineer.

9 (1) Extent of Control. The extent of control necessary to be in
responsible charge shall be such that the engineer:

10 (A) Makes or reviews and approves the engineering decisions
defined and described in subdivision (a) (2) below.

11 (B) In making or reviewing and approving the engineering
12 decisions, determines the applicability of design criteria and technical
recommendations provided by others before incorporating such criteria or
recommendations.

13 (2) Engineering Decisions. The term "responsible charge" relates to
14 engineering decisions within the purview of the Professional Engineers Act.

15 Engineering decisions which must be made by and are the responsibility
16 of the engineer in responsible charge are those decisions concerning permanent or
temporary projects which could create a hazard to life, health, property, or public
welfare, and may include, but are not limited to:

17 (A) The selection of engineering alternatives to be investigated
and the comparison of alternatives for the project.

18 (B) The selection or development of design standards or methods,
and materials to be used.

19 (C) The decisions related to the preparation of engineering plans,
20 specifications, calculations, reports, and other documents for the engineered
works.

21 (D) The selection or development of techniques or methods of
testing to be used in evaluating materials or completed projects, either new or
existing.

22 (E) The review and evaluation of manufacturing, fabrication, or
23 construction methods or controls to be used and the evaluation of test results,
materials, and workmanship insofar as they affect the character and integrity of the
24 completed project.

25 (F) The development and control of operating and maintenance
procedures.

26 (3) Reviewing and Approving Engineering Decisions. In making or
27 reviewing and approving engineering decisions, the engineer shall be physically
present or shall review and approve through the use of communication devices the
28 engineering decisions prior to their implementation.

. . . .

1 8. California Code of Regulations, title 16, section 475 states, in pertinent part,

2 To protect and safeguard the health, safety, welfare, and property of the
3 public, every person who is licensed by the Board as a professional engineer,
4 including licensees employed in any manner by a governmental entity or in private
5 practice, shall comply with this Code of Professional Conduct. A violation of this
6 Code of Professional Conduct in the practice of professional engineering
7 constitutes unprofessional conduct and is grounds for disciplinary action pursuant
8 to Section 6775 of the Code. This Code of Professional Conduct shall be used for
9 the sole purpose of investigating complaints and making findings thereon under
10 Section 6775 of the Code.

11 (a) Compliance with Laws Applicable to a Project:

12 A licensee shall provide professional services for a project in a manner
13 that is consistent with the laws, codes, ordinances, rules, and regulations applicable
14 to that project. A licensee may obtain and rely upon the advice of other
15 professionals (e.g., architects, attorneys, professional engineers, professional land
16 surveyors, and other qualified persons) as to the intent and meaning of such laws,
17 codes, and regulations.

18

19 COSTS

20 9. Section 125.3 of the Code provides, in pertinent part, that the Board may request the
21 administrative law judge to direct a licensee found to have committed a violation or violations of
22 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
23 enforcement of the case.

24 RILEY PROJECT

25 10. In June 2005, D. Riley retained Respondent to create a grading plan and set controls
26 for aerial topographic mapping, for his undeveloped property identified as APN 174-090-52,
27 located in Vista, in the County of San Diego, California. This retention was based upon a written
28 cost estimate dated June 7, 2005 in the sum of \$3,865.00. No written contract was ever prepared
or signed by Respondent and Mr. Riley. Over the course of the next 18 months Respondent
submitted plans to the County of San Diego for approval on four separate occasions, in December
2005, June 2006, October 2006 and December 2006. None of the submittals by the Respondent
were approved by the County. Mr. Riley never received a stamped approved set of plans from the

1 Respondent for the work on the property. Respondent eventually billed Mr. Riley a total of
2 \$13,768.43 for this project and collected \$7,737.40 from Mr. Riley.

3 **FIRST CAUSE FOR DISCIPLINE**

4 **(Negligence in the Practice of Engineering)**

5 11. Respondent is subject to disciplinary action under Code section 6775 (c) in that
6 Respondent was negligent in his practice of engineering regarding the undeveloped property
7 identified as APN 174-090-52, located in Vista, in the County of San Diego, California, as
8 follows.

9 12. The number of rejected plan submittals and the excessive time between submittals
10 show the plans were incomplete and lacked sufficient detail necessary for project approval and
11 were below the standard of care.

12 13. The plans did not comply with the standard of care for plan preparation in that they
13 did not have retaining wall heights and grading catch points.

14 **SECOND CAUSE FOR DISCIPLINE**

15 **(Failure to Maintain Responsible Charge)**

16 14. Respondent is subject to disciplinary action under Code section 6775 (g), for
17 violation of California Code of Regulations, Title 16, section 404.1, in that Respondent did not
18 adequately supervise his associate and was not in "responsible charge" of the Riley project.

19 **THIRD CAUSE FOR DISCIPLINE**

20 **(Failure to Execute a Written Contract)**

21 15. Respondent is subject to disciplinary action under Code section 6749 (a) (3), (4) and
22 (5), in that Respondent did not provide a written contract to his client, Mr. Riley. The cost
23 estimate that was given to the client was insufficient as a contract in that it was not signed by the
24 client and did not provide the following required items:

- 25 (a) Respondent's professional engineer license number was not provided;
26 (b) No procedure was identified to accommodate additional services;
27 (c) No procedure was identified to terminate the contract.

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PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Board for Professional Engineers and Land Surveyors issue a decision:

1. Revoking or suspending Civil Engineer License Number C 31915, issued to David Harlan Lowen.
2. Ordering David Harlan Lowen to pay the Board for Professional Engineers and Land Surveyors the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;
3. Taking such other and further action as deemed necessary and proper.

DATED: 7/19/10

Original Signed

DAVID E. BROWN
Executive Officer
Board for Professional Engineers and Land Surveyors
Department of Consumer Affairs
State of California
Complainant

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